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No. 01-75

IN THE

Supreme Court of the United States

PATRICIA E. GENTALA AND ROBERT A. GENTALA,

Petitioners,

vs.

THE CITY OF TUCSON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The respondent City of Tucson authorizes the provision, free of charge,[1] of basic city services -- lighting, trash collection, use of facilities like bandshells and stage equipment, etc. -- to a wide range of nonprofit organizations holding events in public parks. The city, however, categorically denies free in-kind services -- and instead requires payment of fees -- for events with messages reflecting a religious viewpoint. The en banc Ninth Circuit held that the Establishment Clause of the First Amendment *requires* this discriminatory policy. This holding plainly conflicts with this Court's equal access jurisprudence, most notably *Good News Club v. Milford Central School*, 121 S. Ct. 2093 (2001), and *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). Pet. §§ I-III, V. Moreover, the Ninth Circuit's decision creates a split in the circuits. Pet. § IV.

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[1]The city asserts that its fees for city services "are mandatory and may not be waived." Opp. at 1. This assertion is at best semantics, and at worst a misrepresentation. It is undisputed that what actually happens is that the city sets fees for various services, but when an event sponsor's application under the Civic Event Policy is approved, the relevant fees are charged off against the city's own Civic Event Fund account -- i.e., the city pays itself, and the event sponsor is not charged. *See* Pet. at 3; Opp. at 5; 244 F.3d at 1069 (Ninth Circuit's explanation of process); Pet. App. 162a (city's own policy describing charge-off as "a budgetary means of detailing the costs City departments incur providing in-kind support to Civic Events"). This provision of services "at no charge," Pet. App. 162a (Civic Event Policy), may fairly be characterized as a waiver of fees. Indeed, the city itself describes the provision of in-kind services under the policy as "fee waivers through the Civic Event funding process," Pet. App. 137a (application form). *See also* Pet. App. 164a (city policy excepts fees for only one facility from eligibility for rental fee "waivers through the Civic Event Funding Process").

Petitioners Patricia and Robert Gentala do not claim automatic entitlement to free city services for their National Day of Prayer event. Rather, the Gentalas seek only to be afforded the same treatment as is given to sponsors of events with secular viewpoints. The Gentalas challenge the constitutionality of the city's automatic disqualification of private speech *because of its religious viewpoint*.

I. Conflict with *Good News Club*

The Gentalas' petition for certiorari identifies several distinct ways in which this Court's *Good News Club* decision repudiates the legal analysis the Ninth Circuit employed in the present case. Pet. § I. In its opposition to certiorari, the city does not -- because it cannot -- contest a single one of these points. Instead, the city

- erroneously labels the *Good News Club* majority a mere "plurality," Opp. at 11, 12;

- incorrectly claims that the *Good News Club* decision "did not address the Establishment Clause issue," Opp. at 11; *compare Good News Club*, 121 S. Ct. at 2103-07 (addressing Establishment Clause issue); and,

- invokes insignificant "*fact* differences" between *Good News Club* and the present case to deflect the *legal* analysis of *Good News Club*, Opp. at 12 (emphasis added).[2]

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[2]Contrary to the city, this case unquestionably fits squarely into this Court's line of "equal access" precedents. Even the court below recognized

(continued...)

Respondent cannot reconcile the Ninth Circuit's decision here with *Good News Club*. Moreover, in *Good News Club* this Court expressly identified the Ninth Circuit's decision below as falling on the wrong side of a circuit split, *see Good News Club*, 121 S. Ct. at 2099.

II. Conflict with *Rosenberger*

The Ninth Circuit, recognizing *Rosenberger* as "quite similar" to the present case, 244 F.3d at 1074, nevertheless labored heavily to distinguish *Rosenberger*. 244 F.3d at 1074-81. As demonstrated in the petition for certiorari, however, each of the Ninth Circuit's purported grounds of distinction crumples under analysis. Pet. § III(A).

Tellingly, the respondent city makes no more than a token effort to defend the Ninth Circuit's treatment of *Rosenberger*. Opp. at 17-18. Indeed, the city offers no legal analysis beyond a regurgitated list of the Ninth Circuit's supposed grounds for distinction. *Id.* While it is true that every Establishment Clause case rests on its unique facts, *id.* at 17, it is incumbent upon the city -- which bears the burden of supporting its affirmative defense under the Establishment Clause -- to explain *why* the

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[2](...continued)
that this Court's equal access decision in *Rosenberger* was the most pertinent precedent. *See* 244 F.3d at 1074-81. Both *Rosenberger* and *Good News Club* apply the same constitutional forum analysis to viewpoint-based religious exclusions. *See Rosenberger*, 515 U.S. at 828-46; *Good News Club*, 121 S. Ct. at 2099-2107. Thus, the *Good News Club* ruling directly bears on the legal analysis in the present case.

inevitable differences in factual details should be legally dispositive here. The city fails to do so.

III. Mischaracterization of the Civic Event Program

The city repeatedly attempts to portray its provision of free city services under the Civic Event Policy as highly limited and exclusive. *See* Opp. at 2, 3 n.4, 4-5, 15, 17, 19-20. The record is to the contrary.

The Gentalas requested city services under the Civic Event Policy in fiscal year 1996-97. Pet. at 6. For the 1995-96 fiscal year, the city's Civic Events Subcommittee had recommended approval of 23 out of 26 applications. *See* Pet. at 5; Opp. at 5 n.8. The city, which bears the evidentiary burden of supporting its affirmative defense under the Establishment Clause, proffered no evidence that this was not a representative year. Indeed, the record evidence regarding the previous fiscal year lists twenty-four approved applications, but only one rejected application, *see* Mem. from City Manager re: Recommended Civic Event Allocations of FY 1995-96 Support (Oct. 9, 1995) (Attachments A and B indicating, *inter alia*, levels of '94-'95 funding) [attached as Ex. B to Decl. of Patricia E. Gentala in Support of Plaintiffs' Motion for a Preliminary Injunction].

The city claims that, aside from the two dozen or so events approved for free city services each year, all other groups must pay for such services. But the city submitted no evidence either to support this proposition or to demonstrate its constitutional significance. *Cf. Good News Club*, 121 S. Ct. at 2107 n.9 (whether many groups or few avail themselves of a limited public forum is irrelevant to the permissibility, under the

Establishment Clause, of allowing groups with religious viewpoints to participate). What the record *does* show is that the city gave its approval to the overwhelming majority of applicants. Pet. at 5 (23 of 26 events approved). *Cf. Rosenberger*, 515 U.S. at 825 (118 of 135 applicants approved for funding). Faced with this fact, the city resorts to speculation outside the record. Such speculation falls far short of an affirmative defense that could justify discrimination against religious viewpoints.

IV. Split in the Circuits

The D.C. Circuit, in *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), held that the Establishment Clause does *not* forbid government from providing, on a religion-neutral basis, free city services for a religious event in a public park. The en banc Ninth Circuit in the case below held precisely the opposite, namely, that the Establishment Clause *does* forbid free city services for religious events, no matter how neutral the government program. *See* 244 F.3d at 1073 n.12 (Establishment Clause requires exclusion of events with religious messages "even if the exclusion is viewpoint discriminatory"). The city points out that some of the specific city services in question in *O'Hair* were different, Opp. at 19, but this detail has no constitutional significance. *Compare* Pet. at 7 (Gentalas requested use of bandshell stage and sound and lighting equipment) *with O'Hair*, 613 F.2d at 933 (government supplied police for crowd and traffic control, portable water fountains, and some electric current). The city also claims that in the present case, city services are not routinely granted to all non-religious users. Opp. at 19. But the record reflects that

virtually every nonprofit group that requested Civic Event services was approved. *See supra* § III.

V. Additional Defects in the City's Analysis

The respondent city defends its policy of excluding religious speech on two rather inconsistent grounds: first, that the policy is *not* viewpoint-discriminatory; and second, that the policy is *allowed* to be viewpoint-discriminatory because the policy addresses only government speech. Neither contention is supportable.

A. The city engages in viewpoint discrimination

The city denies that it categorically excludes religious messages from its program of free in-kind city services. Opp. at 5-6 & n.6. But the city's denial is plainly incorrect.

First, the Civic Event Policy by its terms categorically excludes "events held in direct support of religious organizations." Pet. App. 163a. The city construes this exclusion to cover two kinds of events: fundraisers benefitting religious organizations (i.e., events giving direct *financial* support to religious organizations), and events with religious messages (i.e., events with a *message* in "direct support" of religious organizations). Transcript of Hearing on Motion for Preliminary Injunction [Prel. Inj. Tr.] at 42-43 (D. Ariz. Aug. 8, 1997) (counsel for City of Tucson explaining meaning of religious exclusion).[3]

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[3]The fundraiser exclusion is not pertinent here. Pet. at 8 n.6, 25-26. Nor has the city defended its exclusion of the Gentalas on that basis. Here, it

(continued...)

Second, the city itself admitted that it denied the Gentalas' application because of the event's "religious message," Prel. Inj. Tr. at 43.

Third, the city identified no other basis for excluding the Gentalas' planned National Day of Prayer rally from consideration for in-kind city services under the Civic Event Policy. The courts below all recognized that it was the religious character of the event that prompted the city's denial. Pet. App. 59a-60a (district court); 213 F.3d at 1063 (original Ninth Circuit panel). Indeed, the en banc Ninth Circuit concluded that it was precisely the religious character of the event that *required* its exclusion from the program of free city services, even if that denial was deemed viewpoint-discriminatory. 244 F.3d at 1073 n.12, 1078, 1082.

Fourth, the city's invocation of the record is not to the contrary. The city repeatedly cites to "ER 17-3, exhibits 4-6," Opp. at 4-5 & n.6, as supposedly demonstrating that the city, contrary to its stated basis for denying the Gentalas' application for free city services, actually does allow free services for events with religious messages. The record reference is to three approved events: a fishing clinic for disabled children sponsored by a Lutheran organization; a dedication of a monument commemorating a Mormon Battalion; and the Las Posadas pageant. Opp. at 5 n.6. The fishing clinic had no apparent message at all (other than teaching fishing), much less

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[3](...continued)
was the Gentalas' planned *speech* that would supposedly be in "direct support of religious organizations." *See also* Opp. at 16 (claiming that the city would willingly "fund[] religious speech that . . . does not directly support a religious organization").

a religious message. ER 17-3, Ex. 4. The dedication of the war monument was proposed as a cultural and historical event. ER 17-3, Ex. 5. And the city's Civic Events Subcommittee recommended approval of Las Posadas -- a reenactment of the search of Mary and Joseph for lodging in Bethlehem prior to the birth of Jesus -- "because the Subcommittee concluded that the event is art," ER 7, Ex. C (Civic Events Subcommittee Memorandum of July 6, 1992). *See also* 213 F.3d at 1065.

In none of these three instances did the city purport to approve an event presenting a message with a religious perspective.[4] Indeed, the city argued to the contrary. *See* Defendant's Mem. of Law in Opp. to Plaintiffs' Motion for Preliminary Injunction at 18-20 (explaining away Las Posadas as "cultural, historical and ethnic," the Mormon Battalion Monument as "historic," and the Lutheran fishing event as a "fishing clinic," each of which entailed no more than a "merely incidental" benefit to any religious organization).

In any event, for the city to argue that religious messages are *not* categorically excluded would be for the city to undercut the very basis for excluding the Gentalas. *See* Pet. at 7-8.

In sum, it cannot be credibly denied that the city excluded the Gentalas from consideration for free in-kind city services *because the event featured a message with a religious perspective*. As the city's Civic Event Subcommittee chairman put it, "We're not gonna get into prayer stuff." Verbatim

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[4]These three events do illustrate, however, some of the entanglement problems created by a policy of religious exclusion, which requires city officials to judge what is and is not "religious," *see* Pet. at 21-22.

Transcript of Civic Event Subcommittee Meeting re: "National Day of Prayer" (Apr. 21, 1997) [ER 7-G].

B. The city encourages private speech, not government speech

The city claims that it may discriminate against particular viewpoints with impunity, Opp. at 13, because the provision of free in-kind city services converts private events into government speech, *id.* at 12-14. This contention is meritless. A government program to "encourage" private speakers, Pet. App. at 162a (Civic Event Policy), nevertheless must adhere to the constitutional norm of viewpoint neutrality. *Rosenberger*, 515 U.S. at 833 (distinguishing government speech from "a program to encourage private speakers"); *Board of Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217 (2000) (viewpoint neutrality test governs university funding program to encourage private speakers). The city does not purport to control the content of speech at the Earthday Festival, Gay Pride Picnic, St. Patrick's Day Parade and Festival, or other events receiving in-kind city services under the Civic Event Policy. The present case simply does not fit the "government speech" paradigm.

C. The city's other arguments fail

Two of the city's other contentions merit no more that a brief reply.

The city claims that a valid Free Exercise claim requires a showing that the government burdened a "central belief or practice" of religion. Opp. at 14 (quoting *Hernandez v.*

Commissioner, 490 U.S. 680, 699 (1989)). But this Court expressly rejected the "centrality" test in *Employment Division v. Smith*, 494 U.S. 872, 886-87 (1990). Furthermore, the city's policy is *explicitly discriminatory against religion*, placing that policy in a category of government action particularly noxious to the Constitution. *See* Pet. § II(B).

The city claims that state law requires it to discriminate against the Gentalas' religious message. Opp. at 7 n.11, 12 n.13. This *state* law defense clearly cannot justify violation of the Gentalas' *federal* constitutional rights. *Good News Club*, 121 S. Ct. at 2100 n.2. In any event, this state law affirmative defense is not even before this Court. The district court disallowed the city's motion to amend its answer to add that defense, Appendix to Brief in Opposition at 7, and on the city's cross-appeal, the original Ninth Circuit panel affirmed, 213 F.3d at 1071. The en banc Ninth Circuit declined to reach the issue. 244 F.3d at 1082. The city has not filed a cross-petition for certiorari, and hence the propriety of the state law defense is not presented here.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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